PT 97-11
Tax Type: PROPERTY TAX
Issue: Charitable Ownership/Use

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

METROPOLITAN WATER RECLAMATION DISTRICT of CHICAGO, APPLICANT	)	**Docket No: 94-16-396**
v.	)	**P.I.N.: 10-26-202-014**
STATE of ILLINOIS, DEPARTMENT of REVENUE	)	**Alan I. Marcus, Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

APPEARANCES: Messrs. Joseph L. Stone and James R. Fortcamp of D'Ancona & Pflaum appeared on behalf of The Metropolitan Water Reclamation District.

SYNOPSIS:

This proceeding raises the issue of whether the subject parcel qualifies for exemption from 1994 real estate taxes under 35 **ILCS** 200/15-75.[1] In relevant part, that provision exempts "[a]ll market houses, public squares and other public grounds owned by a municipal corporation and used exclusively for public purposes...[.]" The controversy arose as follows:

On October 24, 1994, the Metropolitan Water Reclamation District of Greater Chicago (hereinafter the "District" or the "applicant"), through counsel, filed a real estate exemption complaint with the Cook County Board of (Tax) Appeals (hereinafter the "Board"). Said complaint alleged that the subject property was

[1]. In People ex rel Bracher v. Salvation Army, 305 Ill. 545 (1922), the Illinois Supreme Court held that the issue of property tax exemption will depend on the statutory provisions in force at the time for which the exemption is claimed. This applicant seeks exemption from 1994 real estate taxes. Therefore, the applicable statutory provisions are those contained in the Property Tax Code, 35 **ILCS** 200/1-1 ***et seq***.

exempt from real estate taxation under 35 **ILCS** 200/15-75. Thereafter, the Board recommended to the Department of Revenue, (hereinafter the "Department") that the requested exemption be approved with the proviso that the improvement be subject to a leasehold assessment. On November 17, 1995 the Department disapproved this recommendation by issuing a certificate finding that the property is not in exempt use.

Applicant filed a timely request for hearing November 30, 1995. After a pre-trial conference, an evidentiary hearing was conducted July 26, 1996. Following submission of all evidence and a careful review of the record, it is recommended that the subject parcel not be exempt from real estate tax for the 1994 assessment year.

FINDINGS OF FACT:

1. The Department's jurisdiction over this matter and its position therein are established by the admission into evidence of Dept. Group Ex. No. 2 and Dept. Ex. No. 3.

2. The District is a municipal corporation organized pursuant to 70 **ILCS** 2605/1 *et seq*. Tr. p. 8. Its corporate purposes are treatment and disposal of sewage for 98% of Cook County. Tr. p. 21.

3. Applicant also clears obstructions on the Des Plaines River as well as engages in pollution and flood control activities throughout the areas of Cook County within its jurisdiction. *Id*.

4. The District's primary sources of revenue are taxes and governmental funding. It also obtains revenue from rental income and user fees. Tr. p. 13.

5. All rental income is applied to the District's general revenues. It pays for the operation and maintenance of applicant's sewage treatment facilities, still water retention facilities and its yet-uncompleted deep tunnel project. Tr. p. 35.

6. The subject property is identified by Permanent Index No. 10-26-202-014. Dept. Group Ex. No. 1. It has no legal address but is located on the east bank of the north shore channel, approximately 150 feet north of Howard Street and extending to within several hundred feet of the Chicago Transit Authority Skokie Swift right-of-way in Skokie, Illinois. Tr. p. 16.

7. The District purchased the subject property, and thereby acquired its ownership interest therein, on May 18, 1909. Applicant Ex. No. 2. It acquired this property as part of its right-of-way for the north shore channel. Tr. p. 22.

8. On November 9, 1950, applicant entered into a long term lease with K & K Excavators, Inc. Under the terms of this lease, applicant demised the subject premises to K & K for use as an asphalt-manufacturing facility. Applicant Ex. No. 4.

9. K & K subsequently assigned its interest in the lease to Crossover, Inc., (hereinafter "Crossover" or the "lessee") a wholly owned subsidiary of Shure Brothers, Inc. Dept. Group Ex. No. 1; Applicant Ex. No. 5; Tr. p. 48.

10. On July 6, 1976, Crossover and the District executed an amendment to the original lease which provided that the subject premises:

> ... [M]ay be used until October 31, 2000 only for the parking of automobiles and other vehicles such as bicycles and motorcycles, and uses incidental thereto, but for no other purposes ...[.]

Applicant Ex. No. 5; Tr. p. 27.

11. The amendment also confirms and ratifies provisions in the original lease which make the lessee responsible for paying property taxes, assessments and water rates. Applicant Ex. Nos. 4, 5. However, the amendment prohibits Crossover from doing anything on the subject parcel that would (in the opinion of the District's chief engineer) cause erosion, shifting or caving on the banks of the channel. *Id*.; Tr. pp. 23-24.

12. The amendment also left the following features of the original lease undisturbed: a provision granting the District a perpetual easement to reconstruct and fairly maintain a 24-foot cinder way which runs across the demised premises; a provision prohibiting Crossover from constructing buildings or placing equipment, materials, etc. on the subject premises; a provision reserving the District's right to construct, reconstruct, maintain and operate intercepting sewers, drain outlets, and pipelines for electrical transmission, et cet. as needed for the corporate purposes of the District; a provision reserving the District's right to use, at any time, a 30-foot wide strip of the subject premises as a free means of access for the District's property lying north of the leased premises to and from Howard Street; a provision reserving the District's right to terminate the lease with respect to the same 30-foot strip of land; and, a provision reserving the District's right of access to the demised premises at all times. *Id*; Tr. pp. 24-26, 49-50.

13. Despite the above restrictions, Crossover used the subject property as a parking lot for its employees and guests during the 1994 tax year. Tr. p. 51.

CONCLUSIONS OF LAW:

On examination of the record established this applicant has not demonstrated by the presentation of testimony or through exhibits or argument, evidence sufficient to warrant exemption from 1994 real estate taxes. Accordingly, under the reasoning given below, the determination by the Department that the above-captioned parcel does not qualify for exemption under 35 **ILCS** 200/15-75 should be affirmed. In support thereof, I make the following conclusions:

A. Constitutional, Statutory and Other Preliminary Considerations

Article IX, Section 6 of the Illinois Constitution of 1970 provides as follows:

> The General Assembly by law may exempt from taxation only the property of the State, units of local government and school districts and property used exclusively for agricultural and horticultural societies, and for school, religious, cemetery and charitable purposes.

The power of the General Assembly granted by the Illinois Constitution operates as a limit on the power of the General Assembly to exempt property from taxation. The General Assembly may not broaden or enlarge the tax exemptions permitted by the Constitution or grant exemptions other than those authorized by the Constitution. Board of Certified Safety Professionals, Inc. v. Johnson, 112 Ill.2d 542 (1986). Furthermore, Article IX, Section 6 is not a self-executing provision. Rather, it merely grants authority to the General Assembly to confer tax exemptions within the limitations imposed by the Constitution. Locust Grove Cemetery Association of Philo, Illinois v. Rose, 16 Ill.2d 132 (1959). Moreover, the General Assembly is not constitutionally required to exempt any property from taxation and may place restrictions or limitations on those exemptions it chooses to grant. Village of Oak Park v. Rosewell, 115 Ill. App.3d 497 (1st Dist. 1983).

Pursuant to its Constitutional mandate, the General Assembly enacted the Property Tax Code 35 **ILCS** 200/1-3 ***et seq***. The provisions of that statute which

govern disposition of the instant proceeding are found in Section 200/15-75, which states as follows:

> All market houses, public squares and other public grounds owned by a municipal corporations *and used exclusively for public purposes* are exempt [from real estate taxation].

35 **ILCS** 200/15-75 (emphasis added).

It is well established in Illinois that a statute exempting property or an entity from taxation must be strictly construed against exemption, with all facts construed and debatable questions resolved in favor of taxation. People Ex Rel. Nordland v. Home for the Aged, 40 Ill.2d 91 (1968); Gas Research Institute v. Department of Revenue, 154 Ill. App.3d 430 (1st Dist. 1987). Based on these rules of construction, Illinois courts have placed the burden of proof on the party seeking exemption, and have required such party to prove, by clear and convincing evidence, that it falls within the appropriate statutory exemption. Immanuel Evangelical Lutheran Church of Springfield v. Department of Revenue, 267 Ill. App. 3d 678 (4th Dist. 1994).

When applying these principles, it must be remembered that the term "exclusively," as used in the context of Section 200/15-75 or other provisions governing property tax exemption, means "the primary purpose for which property is used and not any secondary or incidental purpose." Methodist Old People's Home v. Korzen (hereinafter "Korzen"), 39 Ill.2d 149 (1968). *See also*, Gas Research Institute v. Department of Revenue, 145 Ill. App. 3d 430 (1st Dist. 1987); Pontiac Lodge No. 294, A.F. and A.M. v. Department of Revenue, 243 Ill. App. 3d 186 (4th Dist. 1993).

B. The District's Exempt Status

Illinois courts have long recognized that the District (and its predecessors, the Sanitary District of Chicago and the Metropolitan Sanitary District of Greater Chicago) is a municipal corporation whose property is

subject to exemption under Section 200/9-75 and predecessor provisions[2] if used for appropriate public purposes. Wilson v. Board of Trustees of the Sanitary District of Chicago, *et al*., 133 Ill. 443 (1890); People *ex rel* Lognecker v. Nelson, 133 Ill. 565 (1890); Sanitary District of Chicago v. Martin, 173 Ill. 243 (1898), (hereinafter "Martin"); Sanitary District of Chicago v. Hanberg, 226 Ill. 481 (1907); People *ex rel.* Carr v. Sanitary District of Chicago, 307 Ill. 25 (1923); Metropolitan Sanitary District of Greater Chicago v. Rosewell, 133 Ill. App. 3d 153 (1st Dist. 1985), (hereinafter "Rosewell").

The rationale for exempting District property stems from the taxing authority inherent in all municipal corporations. *See*, Wilson, *supra* at 465-466; 70 **ILCS** 2605/9bb [sic], 2605/9cc [sic]. Specifically, the exemption, like those for state[3] and local government[4] property:

> ... rests upon the most fundamental principles of government, being necessary in order that the functions of government not be unduly impeded, and that the government not be forced into the inconsistency of taxing itself in order to raise money to pay over to itself, which money could be raised only by taxation ...[.]

United States v. Hynes, *et al*., 20 F. 3d 1437 (7th Cir. 1994), citing 12 Am. & English Encyclopedia.

The aforementioned exemptions are based strictly on ownership.[5] Section 200/15-75, however, employs use language which establishes a legislative intent

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[2]. As noted in footnote 1, only the Property Tax Code, 35 **ILCS** 200/1-3 ***et seq***, governs disposition of the instant case. However, the Revenue Act of 1939, 35 **ILCS** 205/1 ***et seq.***, contained statutes governing property tax exemptions for the 1993 tax year. The exemption provisions for tax years prior to 1993 were contained in Ill. Rev. Stat. 1991 par. 500 ***et seq***. These provisions, as well as their predecessors, were repealed when the Property Tax Code took effect January 1, 1994. *See*, 35 **ILCS** 200/32-20.

[3]. 35 **ILCS** 200/15-55.

[4]. 35 **ILCS** 200/15-60.

[5]. *See*, Public Building Commission of Chicago v. Continental Illinois National Bank & Trust Company of Chicago, 30 Ill.2d 115 (1963), (The sole test for the exemption of property of the State of Illinois is ownership); *See also*, 35 **ILCS** 200/15-60(c), which by its plain meaning, provides for exemption of

not "to exempt all property, of every kind and character belonging to municipal corporations." Martin, *supra* at 248-249. Therefore, the subject property cannot qualify for exemption merely because the District owns it. *Id*. at 248. Rather, "the property claimed to be exempt must be owned and used in the manner specified in the law." *Id*. at 252.

Section 200/9-75 provides, in no uncertain terms, that the District's property cannot be exempt unless it is used exclusively for public purposes. The Martin court, which held against exemption of parcels located outside the District's jurisdiction, explained this and other statutory limiting language as follows:

> It is contended that the words "public grounds" must be interpreted according to the general rule that general words following the specific enumeration of objects or things will be held to include only such objects or things as are of the same kind as those specifically enumerated. It has been said that a public market is a designated public place in a town or city to which all persons can repair who wish to by or sell articles there exposed for sale [Citation omitted] and that a public square is intended for beauty and adornment and for the health and recreation of the public. [Citation ommitted]. Both public markets and public squares are for the use of the public, - of all persons who, in the pursuit of business or pleasure, may have occasion to resort thereto, subject, of course, to whatever municipal regulations may be in force regulating the use of same. They are in this respect similar in their use to streets and alleys. The "public grounds" exempt from taxation referred to in this paragraph would therefore, under this rule of construction, *be construed to be grounds which are open for the designated use to the public generally*, and this view would seem to be emphasized by the qualifying clause, "used exclusively for public purposes."

Martin, at 249-250. (emphasis added).

"all property *owned* by any city or village within its corporate limits." (emphasis added).

Here, the District leases the subject parcel to a private, for-profit corporation which uses the demised premises as a parking lot for its own employees and guests. Such a restrictive use effectively prevents the lessee from making the premises available to the general public. Consequently, this use defeats exemption unless it is incidental to that of the District. Korzen, *supra*.

The testimony of Frederick M. Feldman[6] establishes that the District acquired the subject property for exempt purposes. Mr. Feldman testified that "this property here was acquired as part of the right of way for the north shore channel *in the event* [the District has] to construct release sewers within the channels." Tr. pp. 21-22. He further testified that while the subject property "may not be *immediately needed for an overt purpose*, ... [i]*n the event* we have to widen or deepen the channel, *it may be necessary* for us to use this real estate for the execution of this purpose." *Id*. (emphasis added in all instances).

Illinois courts have long held that "evidence that land was acquired for an exempt purpose does not eliminate the need for proof of actual use for that purpose" and therefore, "[i]ntention to use is not the equivalent of actual use." Skil Corporation v. Korzen, 32 Ill.2d 249 (1965); Comprehensive Training and Development Corporation v. County of Jackson, 261 Ill. App.3d 37 (5th Dist. 1994).

Mr. Feldman's testimony clearly establishes that the District acquired the subject premises for appropriate purposes. Nevertheless, the italicized portions thereof constitute speculative evidence of actual use. Therefore, applicant may very well intend to use the subject property for exempt purposes at some unproven point in the future. Such intent is, nonetheless, legally insufficient to sustain the portion of applicant's burden of proof that requires the District to establish actual, exempt use during the 1994 assessment year.

[6]. An employee of the District, Mr. Feldman serves as head assistant attorney in the real estate division of applicant's law department. Tr. p. 8.

The use restrictions contained in the original lease, and the amendment thereto, do not alter the preceding conclusion. These provisions, together with the easement and various reservations of rights, manifest the District's intent to use the subject premises for exempt purposes. Notwithstanding this manifestation, the record fails to establish that any lease provision actually interfered with (or otherwise nullified) Crossover's non-exempt use during the 1994 tax year. Indeed, the testimony (Tr. pp. 37-47) of Dr. A. S. Paintal, a principal of the District's civil engineering and sewer design section, establishes that applicant's use was, at best, "periodic." Tr. p. 40.

Dr. Paintal specifically testified that while there are no District facilities on the subject premises, access to its facilities to the north thereof "must be gained across the subject property." Tr. p. 41. He also indicated that the District's maintenance personnel come on to the property "at least once a month" for purposes of maintaining the facilities. Tr. p. 42.

The preceding excerpts provide some evidence as to the District's actual use of the subject property during 1994. However, other aspects of Dr. Paintal's testimony establish only what the District "may," "might" or "would" do "if" Crossover's use interfered with applicant's right of access to the subject property.

For example, Dr. Paintal indicated that concrete trucks and other "heavy equipment" would have to come across the subject property if the District needed to perform repair work on its adjacent facilities. He also indicated that such equipment "may" have to remain on the premises for up to three or four days and that Crossover could not maintain any structure that interfered with the machinery or otherwise impeded the District's right of access. Tr. pp. 42-43.

The above testimony establishes that the District maintained a right of access over the subject property. Dr. Paintal further stated (at Tr. p. 42) that such access was unimpeded.

One could plausibly argue that the District's unimpeded access provides evidence of appropriate exempt use. However, at best, this evidence establishes that the lessee's use was not inconsistent with that of the District; or, more accurately, that nothing in Crossover's use prevented the District from accessing the premises on what Dr. Paintal characterized as a "periodic" basis. For these reasons, I conclude that applicant's use of the subject property in 1994 was, at best, incidental to that of the lessee. Therefore, such property was not "used exclusively for public purposes" as required by Section 200/15-75.

Section 200/9-195 of the Property Tax Code does not alter the above conclusion. In relevant part, that provision states as follows:

> Except as provided in Section 15-55 [which governs exemption of property owned by the State of Illinois], when property *which is exempt from taxation* is leased to another whose property is not exempt, *and the leasing of which does not make the property taxable*, the leasehold estate and the appurtenances shall be listed as the property of the lessee thereof, or his or her asignee. Taxes on that property shall be collected in the same manner as property that is not exempt, and the lessee shall be liable for those taxes.

35 **ILCS** 200/9-195. (emphasis added).

The italicized portions of Section 200/9-195 establish that the instant case fails to invoke a leasehold assessment for two reasons. First, as demonstrated above, the subject parcel was not used primarily for public purposes in 1994. Therefore, it was not "exempt from taxation" during that time.

More importantly, it is well established that leasing for rent is, by its very nature, a use which destroys exemption. People ex. rel. Baldwin v. Jessamine Withers Home, 312 Ill. 136, 140 (1924). Given this principle, as well as the lessee's non-exempt use, it appears that leasing makes the subject property taxable. Consequently, applicant is not entitled to relief by operation of Section 200/9-195.

A leasehold assessment (or other relief available herein) would also undermine the legislative intent behind Section 200/15-75 and defeat the policy objectives set forth *supra* at p. 7. The plain language of Section 200/15-75 is extremely clear and reflects the General Assembly's intent to provide municipal corporations, such as the District, with relief from real estate taxes on the condition that such corporations devote their property to appropriate public uses.

Here, the District has obtained such relief by obligating its lessee to pay property taxes. Thus, granting the requested exemption would not prevent the District from spending its own revenues on property taxes. Rather, it would effectively relieve the lessee, a private, for-profit corporation which the legislature did not intend to benefit through enactment of Section 200/15-75, of its otherwise legitimate obligation to pay such taxes. Consequently, I recommend that the requested exemption be denied, and further, that this parcel not be subject to the leasehold assessment described in Section 200/9-195.

Applicant seeks to defeat the preceding conclusion by relying on Rosewell, *supra*. There, the District sought exemption for a parcel which it acquired as part of its right-of-way to the Cal-Sag channel. The parcel had been exempt from the time applicant acquired the property in 1913 until 1955, when the District granted a 50-year leasehold to a private corporation.

The property remained vacant and unimproved throughout the term of the lease. Nevertheless, like Crossover, the lessee in Rosewell was obligated to pay property taxes. It defaulted on its lease and any taxes due in 1978, whereupon the District instituted forcible detainer proceedings.

The District prevailed in those proceedings and obtained a judgment returning posession of the property in February of 1980. It subsequently filed for injunctive relief declaring the property exempt in order to prevent the res from being sold at tax sale. The trial court issued the requested relief, whereupon defendant tax officials appealed.

In affirming the trial court, the appellate court emphasized that "during the period of the leasehold, the property remained vacant and unimproved." Rosewell at 156. Thus, it was factually impossible for the District's use to be incidental to that of the non-exempt lessee. Here, the record provides that the subject parcel was primarily used for Crossover's non-exempt purposes during 1994. Accordingly, I distinguish Rosewell from the present case in that, here, applicant's use of the property is incidental to that of its lessee.

Applicant also attempts to reverse the above conclusions by distinguishing the Department's decision in Metropolitan Water Reclamation District of Greater Chicago, Owner, Olympic Oil Ltd., Lessee v. Department of Revenue, 92-16-1169 (June 21, 1995). (hereinafter "Olympic Oil"). In that case, the District's lessee sought (through application of the then-existing version of Section 200/9-125) to exempt applicant's fee interest in the subject parcel.

The lessee, a for-profit corporation, was obligated to pay property taxes under the terms of its lease with the District. It owned a three-story building, 20 oil storage tanks as well as other necessary piping and appurtenances, all of which were located on the subject property. During the assessment year in question, the lessee used these premises in the conduct of its for-profit business.

The ALJ found that, even though the lease contained numerous reservations of rights in favor of the District (which are substantially similar if not identical to the ones reserved here), the property was primarily used for the lessee's non-exempt purposes. In reaching this conclusion, the ALJ distinguished Rosewell on grounds that the lessee therein placed no improvements on the subject property. He also argued that Section 200/9-125 did not apply because leasing made the property taxable.

The present case is very similar to Olympic Oil because applicant's lessee uses the subject property in furtherance of its non-exempt purposes even though the District reserves certain rights of access under the lease. Insofar

lessee's purposes were the primary ones for which the subject property was used in 1994, I am unable to discern any factual distinction between the present matter and Olympic Oil. This is especially true considering that, unlike Rosewell, the subject premises in the present case and Olympic Oil are (were) *not* "vacant and unimproved."

Olympic Oil is also similar to the present matter in that leasing prevented application of Section 200/9-125 to the lessee's interest. Thus, I fail to see how the two cases are legally distinguishable. Consequently, while Olympic Oil may have limited, if any, precedential value, applicant's attempt to distinguish its result must fail.

WHEREFORE, for the reasons set forth above, it is my recommendation that the subject parcel be denied exemption from 1994 real estate taxes.

Date

Alan I. Marcus,
Administrative Law Judge